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IN THE
COURT OF APPEALS OF INDIANA

BRYANT T. ROGERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0603-CR-134
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-0109-CF-398

January 25, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Bryant T. Rogers challenges the validity of his forty-four-year sentence. He asserts the court violated his right to a jury under the Sixth Amendment when it found aggravating factors, and he alleges the court improperly found and balanced the aggravators and mitigators. Because the aggravators permitted under the Sixth Amendment were sufficient to outweigh the mitigators, we affirm.

FACTS AND PROCEDURAL HISTORY

On August 27, 2001, seventeen-year-old Rogers was playing craps with Darnell Star, James Felix, Jerome Lovinggood, and others. The four friends lost money, so Lovinggood suggested they rob a cab driver. Rogers did not want to call from his house, because the call could be traced, so the four walked to a pay phone and called for a cab. When the cab arrived, Star served as a lookout, Felix opened the door, and either Lovinggood or Rogers pointed a gun at the driver, Paul Koch, and demanded his money. The driver reached for something with his right hand and was shot in the head. The four teens fled the scene, and the driver died.

The State charged Rogers with felony murder and with attempted robbery as a Class A felony. Rogers pled guilty to attempted robbery in exchange for dismissal of the felony murder charge. Under the plea agreement, Rogers was required to testify truthfully at Lovinggood's trial. The agreement set twenty-five years as his minimum sentence and permitted the parties to argue the other terms of the sentence. On April 29, 2002, after a hearing, the court made the following sentencing statement:

> Well, Mr. Rogers, you know you're the third person that I've sentenced so far in this case. And I've told everybody about the same thing.

Each of you are fairly young, and each of you have your whole lives in front of you. You know, Paul [Koch], however does not. His life ended on August 21st when he was shot and killed -- no August 27th, when he was shot and killed in the course of this attempted robbery.

And your family and friends can look forward to some day when you'll be with them, but Mr. and Mrs. [Koch] out here don't have that. They can't look forward to any day that they're going to be with their son, because of what you four folks did in concocting this scheme and the carrying it out, killed him.

And I understand what Mrs. [Koch] says about life in prison, which is what she would like. But the plea agreement doesn't let me do that, and I'm bound by the plea agreement.

When I reviewed this I had to weigh the mitigating and aggravating factors and kind of balance out what I'm going to do.

The law says that I have to start out presuming that thirty years is the right sentence. That's what the law says, I start out at thirty years, and then I can go up or down, based upon what else I hear.

In looking at the pre-sentence report, I do note that you have expressed remorse about what occurred.

I do note that you've pled guilty in this case, which has relieved the State of it's [sic] burden of proof, and it's also relieved the [Kochs] from having to go through a trial and the uncertainties that go along with that.

I do note your age.

The family contact here, although somewhat tenuous as indicated in the pre-sentence report, nonetheless you do have contacts with people, family and friends here in this community who support you. So I note that as a mitigating factor.

With respect to the aggravating side?

I do have to consider the facts and circumstances in this case. The nature of the injury which occurred went beyond merely serious bodily injury, it was something that resulted in death.

The fact that this man who you folks killed, was just doing his job and got called to a place to pick you or others up in his cab, doing what he gets paid to do, and ends up getting killed for doing that. I think that is something that I consider in aggravation as well.

The fact that a weapon was used in this case, a handgun, is not an element of the offense, but the serious bodily injury is, and so it's not a statutory element, so I consider the weapon to be an aggravating factor as well.

Also, I note that you have a juvenile adjudication for resisting law enforcement and trespass, and you were on probation in 99-JD-910 at the time these events occurred.

Also in looking at the pre-sentence report as it relates to your character and condition, it indicates that you got kicked out of school by

> threatening a person, and I don't know if that ended up being dismissed in the juvenile system, but nonetheless it was something that got you out of school.
>
> So I consider all of that as aggravating.
>
> And I do understand that problem here when you take a look at the original statements given to the police in this case, one of the defendants, Mr. Star says that you gave Lovinggood the gun and that Lovinggood shot.
>
> Then Lovinggood says he didn't shoot, but you shot.
>
> Felix originally says that you shot, but apparently has changed his mind in depositions …
>
> And you say that you provided the gun and made the phone call to get the cab driver there but that Jerome Lovinggood shot.
>
> So we've got a situation where somebody shot this person, and this person clearly is dead, and two names have been named, you and Mr. Lovinggood, but it's not clear as to what really happened.
>
> And I guess based upon that the State has entered into this plea agreement, because they got a little nervous about trying to prove this thing at trial.
>
> But it seems when weighing the aggravating and mitigating factors, and particularly in thinking about the fact that whether you shot or not, you are the person who got this thing going, and you are the person that provided the gun-- either provided the gun to Mr. Lovinggood or used it yourself; I think in fairness to everybody here the same sentence that I gave Mr. Lovinggood would be appropriate here.
>
> So I will find that the aggravating factors outweigh the mitigating factors, and I will sentence you to the Indiana Department of Corrections [sic] for a period of forty-four years.

(Tr. at 28-32.)

On November 29, 2005, Rogers petitioned to file a belated notice of appeal. The trial court granted his petition.

DISCUSSION AND DECISION

Sentencing lies within the discretion of the trial court. *Hayden v. State*, 830 N.E.2d 923, 928 (Ind. Ct. App. 2005), *trans. denied* 841 N.E.2d 184 (Ind. 2005). If a trial court uses aggravating or mitigating circumstances to enhance the presumptive

sentence,[1] it must (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate its evaluation and balancing of the circumstances. *Id.* The trial court's assessment of the proper weight of mitigating and aggravating circumstances and the appropriateness of the sentence as a whole is entitled to great deference and will be set aside only on a showing of a manifest abuse of discretion. *Id.* Even a single aggravating circumstance may support the imposition of an enhanced sentence. *Id.*

1. *Blakely v. Washington*

In *Blakely v. Washington*, 542 U.S. 296, 301 (2004), *reh'g denied* 542 U.S. 961 (2004), the Supreme Court held the Sixth Amendment requires a jury to determine beyond a reasonable doubt the existence of aggravating factors used to increase a sentence above the presumptive sentence assigned by the legislature. In *Smylie v. State*, 823 N.E.2d 679, 686 (Ind. 2005), *cert. denied* --- U.S. ---, 126 S.Ct. 545 (2005), our Indiana Supreme Court held *Blakely* applies to Indiana's sentencing scheme, and thus requires "the sort of facts envisioned by *Blakely* as necessitating a jury finding must be found by a jury under Indiana's existing sentencing laws."

However, *Blakely* does not require a jury find every fact used to enhance a sentence beyond the statutory maximum. There are at least four ways such facts may properly be found and used by a court to enhance a sentence. An aggravating

[1] In 2005, in response to *Blakely v. Washington*, 542 U.S. 296 (2004), *reh'g denied* 542 U.S. 961 (2004), our legislature modified the sentencing statutes to provide for "advisory" rather than "presumptive" sentences. Because Rogers' crime occurred prior to the enactment of those new sentencing statutes, we apply the prior versions. *See Creekmore v. State*, 853 N.E.2d 523, 528-29 (Ind. Ct. App. 2006) ("the application of the new sentencing statutes to crimes committed before the effective date of the amendments violates the prohibition against *ex post facto* laws"), *modified on reh'g on other grounds* 858 N.E.2d 230 (Ind. Ct. App. 2006).

circumstance is proper under *Blakely* when it is: 1) a fact of prior conviction; 2) found by a jury beyond a reasonable doubt; 3) admitted or stipulated by a defendant; or 4) found by a judge after the defendant consents to judicial fact-finding. *Trusley v. State*, 829 N.E.2d 923, 925 (Ind. 2005).

Rogers' sentencing occurred prior to *Blakely*, and he did not consent to judicial fact finding; therefore, we must determine whether aggravators were found in violation of his Sixth Amendment right to a jury. In this belated appeal, he challenges as inappropriate under *Blakely* two of the aggravators found by the court: the nature and circumstances of the crime, and the allegation he was kicked out of school for threatening someone. The State concedes the court's reliance on the pre-sentence investigation to support finding Rogers threatened someone at school, without an admission of those facts by Rogers, was "likely" improper under *Blakely*.[2] (Appellee's Br. at 12.) We accordingly do not consider this alleged aggravator.

As for the nature and circumstances of the crime, the court said the following:

> I do have to consider the facts and circumstances in this case. The nature of the injury which occurred went beyond merely serious bodily injury, it was something that resulted in death.
>
> The fact that this man who you folks killed, was just doing his job and got called to a place to pick you or others up in his cab, doing what he gets paid to do, and ends up getting killed for doing that. I think that is something that I consider in aggravation as well.

(Tr. at 30.)

When Rogers was establishing the factual basis for the plea at the guilty plea hearing, he admitted he and his friends planned to rob a cab driver, Rogers called the cab

[2] The State notes the evidence supporting this aggravator was weak, as the pre-sentence investigation indicated Rogers "was falsely accused of making the threats." (Appellee's Br. at 12.)

company from a pay phone, Lovinggood shot the driver, they intended to rob the cab driver, the cab driver was shot, the cab driver died, and all those actions were a substantial step toward the commission of robbery. (*See id*. at 17-19.) Roger's admission that the cab driver died adequately supports the court's conclusion the nature and circumstances of the crime were an aggravator.[3]

2. Finding of Mitigators

Rogers asserts the court failed to find or give adequate weight to his alleged mitigators.[4] The trial court is not required to find mitigating circumstances. *Bocko v. State*, 769 N.E.2d 658, 667 (Ind. Ct. App. 2002), *reh'g denied*, *trans. denied* 783 N.E.2d 702 (Ind. 2002). *Id.* When a defendant offers evidence of mitigators, the court is not obliged to find mitigating factors or explain why it has chosen not to do so. *Wilkie v. State*, 813 N.E.2d 794, 799 (Ind. Ct. App. 2004), *trans. denied* 822 N.E.2d 981 (Ind.

[3] Rogers also claims the court could not use his admission the cabdriver died as an aggravator for his sentence for robbery resulting in serious bodily injury because, when defining "serious bodily injury," the legislature contemplated the victim might die. *See* Ind. Code § 35-41-1-25 (defining "serious bodily injury" in part as an "injury that creates a substantial risk of death . . . ."). We disagree because we see an obvious distinction between "substantial risk of death" and "death." *See Patterson v. State*, 846 N.E.2d 723, 728 (Ind. Ct. App. 2006) (When defendant pled guilty to robbery resulting in serious bodily injury in exchange for dismissal of murder charge, and defendant challenged court's finding that victim's death was an aggravating circumstance, we held "while the trial court was prohibited from imposing the maximum sentence for robbery resulting in serious bodily injury in an effort to 'compensate' for the State's decision to dismiss the murder charge, it did not abuse its discretion to the extent that [the victim's] injury went beyond that required to constitute 'serious bodily injury.'").

We also reject Rogers' assertion this crime was not egregious because "[r]obberies often occur in workplaces or while the victim is at work." (Appellant's Br. at 14.) Rogers admitted he and his friends telephoned to summon a cab driver to a street corner so they could rob him at gunpoint. We cannot disagree with the trial court's conclusion that it was more egregious for the young men to rob someone they summoned to assist them, than to rob a random victim.

[4] Rogers asserts we should reverse because the court's sentencing statement was unclear about whether the court considered as mitigators Rogers' remorse, his plea, and his age, because the court "note[d]" those facts in the discussion of mitigators without explicitly finding them to be mitigators. Our reading of the sentencing statement, as quoted verbatim herein in the Facts and Procedural History, leads us to conclude the court found those facts mitigating, but not significantly mitigating, because the court did not state, after noting each fact, that it was not a mitigating circumstance. (*See also* Appellee's Br. at 6 n.1) (conceding the court found these facts to be mitigators). Therefore, as we analyze the remainder of Rogers' issues, we presume the court found these mitigators.

2004), *disapproved on other grounds by Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

Rogers asserts his guilty plea was a significant mitigator. "A guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one." *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), *trans. denied* 855 N.E.2d 995 (Ind. 2006). In exchange for Rogers' guilty plea to attempted robbery as a Class A felony, the State dismissed a felony murder charge against him. Because Rogers could have been convicted of felony murder regardless of whether he or Livinggood actually shot the cab driver, and because the other young men had given statements to the police indicating the four of them had committed this crime, the State likely could have convinced a jury to find Rogers guilty of felony murder. Because of his plea, the range of sentence he could receive decreased from between 45 and 65 years to between 25 and 50 years.[5] Ind. Code §§ 35-50-2-3, 35-50-2-4. Accordingly, we cannot find the court abused its discretion in declining to assign "significant" weight to this alleged mitigator.

Next, Rogers claims the court should have found his age "a significant mitigating circumstance which deserved substantial weight" because he was seventeen at the time of the offense. (Appellant's Br. at 15.) Young age "is neither a statutory nor a per se mitigating factor. There are cunning children and there are naïve adults." *Sensback v. State*, 720 N.E.2d 1160, 1164 (Ind. 1999). When a defendant is in his teens or early twenties, we must determine whether the young offender is "clueless" or "hardened and

[5] The statute provided a minimum sentence of 20 years, but the plea agreement set Rogers' minimum sentence at 25 years.

purposeful." *Monegan v. State*, 756 N.E.2d 499, 504 (Ind. 2001). Rogers had a true finding as a juvenile delinquent prior to this event, and we cannot describe an individual who would concoct a plan to rob a cab driver by calling from a pay phone to conceal his identity as "naïve." Therefore, we cannot say the court abused its discretion by declining to assign significant weight to this alleged mitigator.

3. Balancing Aggravators & Mitigators

In summary, the court found four mitigators, none of which it appeared to consider significant: Rogers' remorse, his age, his plea, and his "somewhat tenuous" family support. (Tr. at 29.) As for aggravators, the court found five that were proper: the victim's death, the fact Rogers summoned the cab driver for a ride in order to rob him, the use of a handgun, his criminal history, and his being on probation at the time of the offense.

Rogers notes his limited criminal history should carry little, if any, weight because it contains only one true finding as a juvenile delinquent for resisting law enforcement. We agree with him. *See Bryant v. State*, 841 N.E.2d 154, 1157 (Ind. 2006) (the weight to be given to criminal history depends on the number, type, and seriousness of the prior convictions).

He also claims the fact he was on probation when he committed this offense should not be given significant weight.[6] At the sentencing hearing, Rogers reported he

[6] Rogers notes: "It is unclear why Rogers was still on probation at the time of this offense, given that he was ordered to probation in 1999 and completed his electronic monitoring requirement in January 2000." (Appellant's Br. at 16.) To the extent Rogers implies this aggravator is invalid because his probation should have terminated earlier, we reject his argument. Whether he should have been on probation is an issue he should have addressed with the court that placed him on probation; we decline to consider that collateral issue when deciding whether his violation of probation was an aggravating factor.

was on probation for a juvenile case at the time of this offense. The court responded: "Okay. I don't think that would have much affect on this, but you understand that would be consecutive, and that's an aggravating factor; do you understand that?" (Tr. at 15.) In light of the court's language, we agree with Rogers that the court did not consider this a significant aggravator.

Nevertheless, in light of the five proper aggravators and the four mitigators, we cannot say the trial court abused its discretion in imposing a forty-four year sentence for Rogers' crime. Accordingly, we affirm.

Affirmed.

RILEY, J. concurs.

BAILEY, J. concurs in result.